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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID WIT, et al.,  
Plaintiffs,  
vs.  
UNITED BEHAVIORAL HEALTH,  
Defendant.

Case No. 14-cv-02346-JCS  
Related Case No. 14-cv-05337 JCS

## **SPECIAL MASTER'S ORDER RE SCRIPT FOR ASYNCHRONOUS FIDUCIARY TRAINING**

GARY ALEXANDER, et al.,  
Plaintiffs,  
vs.  
UNITED BEHAVIORAL HEALTH,  
Defendant.

1       In the agenda for the June 3, 2021 meeting with the parties, the Special Master set forth the  
 2 following process for issuing orders: After receiving a draft of a proposed order, the parties have  
 3 three days to provide suggested edits for accuracy. (Dates to be computed per Rule 6 of the  
 4 Federal Rules of Civil Procedure.) If a party objects to the substance of the proposed order, the  
 5 party must lodge a written objection with the Special Master and serve the objection upon  
 6 opposing counsel within 10 days of receiving the proposed order. (Appointment Order ¶ 9.) The  
 7 Special Master will consider any objection to the proposed order and will endeavor to resolve the  
 8 issue to the satisfaction of all parties through good-faith discussions. (Appointment Order ¶ 9.)  
 9 The Special Master will then file the final order on the public docket. If the objecting party  
 10 remains unsatisfied, that party may, within 45 days of the Special Master's filing of the final order,  
 11 seek relief from the Court by filing a noticed motion. (Appointment Order ¶ 9.) The parties agreed  
 12 to follow to this process at the June 3, 2021 meeting.

13       The Special Master provided a draft of this order to the parties on June 16, 2021, for their  
 14 review. The Special Master received minor, nonsubstantive proposed edits, which have been  
 15 incorporated into this order. No party objected to the draft order. Accordingly, it is now final.

16 **I. BACKGROUND**

17       As part of its Remedies Order, the Court directed United Behavioral Health (UBH),  
 18 “[w]ith the oversight and approval of the Special Master,” “to develop and implement a program,  
 19 to train [its] Care Advocates, Peer Reviewers, external clinical consultants, any other personnel  
 20 who make or have input into coverage determinations, and all senior and executive management  
 21 on UBH’s duties under ERISA, including what it means to be an ERISA fiduciary and to  
 22 administer benefit plans solely in the interests of participants and beneficiaries, as well as the need  
 23 to comply with plan terms.” Remedies Order (ECF No. 491) at Section IV, B.3; *see also*  
 24 Appointment Order ¶ 19.

25       Over the past few months, UBH has been collaborating with Plaintiffs to design a training  
 26 program for its personnel on UBH’s fiduciary duties under ERISA. The parties have agreed upon  
 27 two methods of instruction: live training and asynchronous training (which has interactive  
 28 components). *See* Joint Case Management Statement (ECF No. 554) at 2. The parties have agreed

1 that UBH's Care Advocates will receive only the asynchronous training. Joint Case Management  
 2 Statement (ECF No. 554) at 2. Peer Reviewers and senior and executive management will receive  
 3 the live training.<sup>1</sup> *Id.*

4 Care Advocates represent the vast majority of UBH's personnel to receive the fiduciary  
 5 training under either method.<sup>2</sup> The Court described the role of Care Advocates as "first-line"  
 6 reviewers:

7 When a member or provider submits a request for coverage to UBH, a "Care  
 8 Advocate" is assigned to (1) determine whether there is an administrative (i.e., non-  
 9 clinical) basis to deny the request, such as a contractual exclusion for a particular  
 10 form of treatment or a certain condition, and (2) make an initial determination  
 11 whether the prescribed treatment, at the proposed level of care, meets criteria in the  
 12 applicable Guideline. Care Advocates may deny a request on administrative  
 13 grounds or grant a request on clinical grounds; but if they conclude based on the  
 14 applicable Guidelines and the information they have collected about the member  
 15 that the requested service should be denied for clinical reasons they must pass the  
 16 request on to a Peer Reviewer, who is a physician or doctoral-level psychologist  
 17 authorized by UBH to make a Clinical Non-Coverage Determination.

18 FFCL (ECF 329) at 23 (citations omitted). Consistent with the Court's description, UBH has  
 19 represented, and Plaintiffs do not dispute, that Care Advocates are not involved in developing  
 20 UBH's guidelines or policies.

21 The asynchronous training will follow a script. The script begins by providing background  
 22 on the lawsuit, including the Court's Remedies Order and its Findings of Fact and Conclusion of  
 23 Law. Participants in the asynchronous training then receive instruction on UBH's fiduciary duties  
 24 under ERISA, including examples of fiduciary actions that UBH performs. As part of the training,

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<sup>1</sup> The parties disagree whether UBH's Peer Reviewers and senior and executive management will  
 also need to complete the asynchronous training in addition to the live training. *See* Joint Case  
 Management Statement (ECF No. 554) at 2. If the parties continue to disagree on this point, the  
 Special Master will resolve the disagreement in a subsequent order. The same is true with regard  
 to disputes that may arise with regard to the training of newly hired personnel, an issue the parties  
 have yet to resolve.

<sup>2</sup> UBH estimates that about 1,335 people will receive the fiduciary training initially. Joint Case  
 Management Statement (ECF No. 554) at 2. Of those, UBH estimates 1,175 are Care Advocates;  
 70 are Peer Reviewers; 10 are External Clinical Consultants; 50 are Senior and Executive  
 Management; and 30 are "other personnel." Letter from Jennifer Romano, Crowell & Moring, to  
 Douglas Young, Special Master (Feb. 24, 2021) (on file with the Special Master).

1 participants are prompted to answer a number of questions to test and reinforce what they have  
 2 learned.

3       Although the parties have largely agreed upon the script's content, two "global" disputes,  
 4 implicating nine specific disputes, remain. On May 26, 2021, the parties made a joint submission  
 5 (attached as Exhibit A) including the agreed-upon text and each party's proposed language and  
 6 position in connection with the nine text disputes. The Special Master has considered the parties'  
 7 joint submission, the Court's Findings of Fact and Conclusions of Law and the Remedies Order,  
 8 correspondence from the parties to the Special Master, representations by counsel during the  
 9 Special Master's meetings with the parties, and the parties' Court filings, and makes the following  
 10 determinations.

11 **II. DISCUSSION**

12       **A. Global Dispute No. 1**

13       Global Dispute No. 1 concerns whether there are ever circumstances in connection with  
 14 UBH's administration of ERISA plans in which UBH is *not* acting as a fiduciary.

15       As an initial matter, UBH acknowledges that it often acts as a fiduciary in connection with  
 16 its administration of ERISA plans. Joint Submission at 3 (acknowledging that it "frequently acts in  
 17 a fiduciary capacity with respect to ERISA-governed plans at issue"); *id.* at 4 ("many, but not all,  
 18 functions performed by UBH are fiduciary in nature"); *id.* at 5 ("the sort of clinical determinations  
 19 that were the subject of the FFCL are fiduciary functions"). Indeed, "administrators making  
 20 benefits determinations . . . are ordinarily acting as plan fiduciaries." *Aetna Health Inc. v. Davila*,  
 21 542 U.S. 200, 220 (2004); *id.* at 218 ("A benefit determination under ERISA [] is generally a  
 22 fiduciary act").

23       At the same time, the Ninth Circuit recently has acknowledged that a "named fiduciary  
 24 may perform non-fiduciary functions." *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1027  
 25 (9th Cir. 2021); *see also Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) ("the threshold question"  
 26 is "whether [the] person was acting as a fiduciary (that is, was performing a fiduciary function)

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1 when taking the action subject to complaint").<sup>3</sup> "[A] fiduciary function" involves "discretion or  
 2 control." *Bafford*, 994 F.3d at 1028.

3       The parties dispute whether UBH performs any nondiscretionary functions in connection  
 4 with its administration of ERISA plans. UBH asserts that "there are parts of a claims review that  
 5 do not involve discretion." Joint Submission at 5. Plaintiffs, in turn, assert that UBH's examples of  
 6 nondiscretionary acts are, in fact, discretionary. Joint Submission at 5; *id.* at 15 ("the very process  
 7 of evaluating *whether* a member has 'disenrolled' constitutes a discretionary act" (emphasis in  
 8 original)).

9       For the limited purpose of training UBH personnel on UBH's fiduciary duties under  
 10 ERISA pursuant to the Remedies Order and recognizing UBH's acknowledgment that the clinical  
 11 determinations that were the subject of the FFCL are "fiduciary functions, Joint Submission at 5, it  
 12 is not necessary to determine whether (and under what circumstances) UBH ever performs a  
 13 nonfiduciary function. Introducing this distinction to Care Advocates, the only group of personnel  
 14 that the parties have agreed will take the asynchronous training exclusively, would not advance the  
 15 purpose of the training and, worse, could cause confusion. Therefore, the Special Master will  
 16 resolve the parties' disputes by adopting language that acknowledges UBH's performance of  
 17 fiduciary functions in connection with its administration of ERISA plans under the applicable facts  
 18 of this case and in accordance with the Remedies Order, but that does not reflect any  
 19 determination regarding whether UBH ever performs any nonfiduciary functions in connection  
 20 with its administration of ERISA plans in other contexts.<sup>4</sup>

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<sup>3</sup> The Special Master does not interpret the Court's statement in Paragraph 197 of the Findings of Fact and Conclusions of Law to constitute a decision regarding whether UBH ever performs a non-fiduciary function in connection with the ERISA plans it administers. The Special Master understands that this issue was not presented to the Court.

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<sup>4</sup> The Special Master acknowledges that UBH may be concerned about the use of the fiduciary training text against UBH in some other proceeding. However, employing the text adopted by the Special Master will not constitute any admission by UBH, and UBH will not waive any appropriate argument in a different proceeding.

1           **B. Specific Disputes Implicated by Global Dispute No. 1: Dispute Nos. 1, 2, 4, 6-9**

2           **1. Dispute No. 1 (Pages 3-6)**

3           Early in the training, the trainees are prompted to consider “What is an ERISA fiduciary?”

4           The script answers: “Any person or entity who has discretionary authority or discretionary control  
 5 over the management or administration of the plan is considered a ‘fiduciary,’” and then provides  
 6 several examples. The first dispute regards the second example of a fiduciary act.

- 7           • Plaintiffs propose: “When administering mental health and substance use disorder  
           benefits under ERISA plans, **UBH is [a]** fiduciary” (emphasis in original).
- 8           • UBH proposes: “When administering mental health and substance use disorder benefits  
           under ERISA plans, **in many instances, UBH acts as a** fiduciary” (emphasis in  
           original).

11           The Special Master adopts the following: “UBH acts as a fiduciary in connection with its  
 12 administration of mental health and substance use disorder benefits under ERISA plans.”

13           **2. Dispute No. 4 (Page 8)**

14           The fourth dispute regards the catch-all answer following the list of examples of fiduciary  
 15 acts on pages 2 through 8.

- 16           • Plaintiffs propose: “There are many more examples of ‘fiduciary acts.’ In effect,  
           whenever UBH is administering benefits for one or more ERISA plans, it **is** acting as a  
           fiduciary” (emphasis in original).
- 18           • UBH proposes: “There are many more examples of ‘fiduciary acts.’ In effect,  
           whenever UBH is administering benefits for one or more ERISA plans, it **may be**  
           acting as a fiduciary” (emphasis in original).

20           The Special Master adopts the following: “There are many more examples of ‘fiduciary  
 21 acts.’ UBH acts as a fiduciary in connection with administering benefits for one or more ERISA  
 22 plans.”

23           **3. Disputes No. 6 and No. 7 (Page 12)**

24           Trainees are prompted to consider, “Why Are ERISA’s Fiduciary Duties Relevant to  
 25 UBH?” The parties dispute the text of the answers to this question.

26           **a. Dispute No. 6 (Page 12)**

27           Dispute No. 6 concerns the first answer.

- 28           • Plaintiffs propose: “As noted earlier, UBH is a fiduciary of the ERISA plans it

1 administers.”

- 2 • UBH proposes: “As noted earlier, **in many instances**, UBH is a fiduciary of the ERISA  
3 plans it administers” (emphasis in original).

4 The Special Master adopts the following: “As noted earlier, UBH is a fiduciary in  
5 connection with the ERISA plans it administers.”

6 **b. Dispute No. 7 (Page 12)**

7 Dispute No. 7 concerns the explanation of the second answer: “Most of the employer-  
8 sponsored plans that UBH administers are governed by ERISA.”

- 9 • Plaintiffs propose: “This means UBH owes fiduciary duties to the members of those plans,  
10 including when it approves or denies benefits, exercises clinical judgment, or otherwise  
11 interprets a plan term.”
- 12 • UBH propose: “This means UBH owes fiduciary duties to the members of those plans,  
13 **under certain circumstances**, including when it approves or denies benefits, exercises  
14 clinical judgment, or otherwise interprets a plan term” (emphasis added).

15 The Special Master adopts the following: “This means UBH owes fiduciary duties to the  
16 members of those plans, including in connection with its approvals and/or denials of benefits,  
17 exercise of clinical judgment, and interpretations of plan terms.”

18 **4. Disputes No. 8 and No. 9 (Pages 14–15, 16–17)**

19 The script prompts trainees to consider, “What Do UBH Care Advocates and Peer  
20 Reviewers Need to Know about ERISA’s Fiduciary Duties?” Disputes No. 8 and No. 9 concern  
21 answers to this question.

22 **a. Dispute No 8 (Pages 14–15)**

23 The parties dispute the first answer.

- 24 • Plaintiffs propose: “When you review a claim for benefits under an ERISA plan, UBH is  
25 engaging in a fiduciary act, meaning **you are** acting as a fiduciary and need to comply with  
26 the fiduciary duties imposed on fiduciaries by ERISA” (emphasis in original).
- 27 • UBH propose: “When you review a claim for benefits under an ERISA plan, **in many  
28 instances**, UBH is engaging in a fiduciary act, meaning **it is** acting as a fiduciary and needs  
to comply with the fiduciary duties imposed on fiduciaries by ERISA” (emphasis in  
original).

29 The Special Master adopts the following: “UBH engages in fiduciary acts in connection  
30 with your review of claims for benefits under ERISA plans, meaning you must comply with the

1 duties imposed on fiduciaries by ERISA.”

2                   **b. Dispute No. 9 (Pages 16–17)**

3 Trainees are then given examples of when they might be engaging in fiduciary acts;

4 Dispute No. 9 concerns one such example.

- 5     • Plaintiffs propose: “When you analyze a claim to determine whether other written plan  
6 terms are satisfied (i.e., whether ‘administrative requirements’ have been satisfied, such as  
7 precertification requirements), UBH **is** engaging in a fiduciary act” (emphasis in original).
- 8     • UBH proposes: “When you analyze a claim to determine whether other written plan terms  
9 are satisfied (i.e., whether ‘administrative requirements’ have been satisfied, such as  
10 precertification requirements), UBH **often is** engaging in a fiduciary act” (emphasis in  
11 original).

12                  The Special Master’s adopts the following: “UBH engages in fiduciary acts in connection  
13 with your analysis of claims to determine whether other written plan terms are satisfied (i.e.,  
14 whether ‘administrative requirements’ have been satisfied, such as precertification requirements).”

15                   **C. Global Dispute No. 2 (Disputes Nos. 3 and 5)**

16                  Global Dispute No. 2 concerns whether there are circumstances in which UBH acts in a  
17 nonfiduciary function when developing business-wide guidelines or other internal policies.

18                   **1. Dispute No. 3 (Pages 6–8)**

19                  The parties propose two versions of an example of a fiduciary act.<sup>5</sup>

- 20     • Plaintiffs propose: “Developing guidelines or other internal policies to administer or  
21 interpret employer-sponsored plans.”
- 22     • UBH proposes: “Developing guidelines or other internal policies to administer or  
23 interpret a **particular** employer-sponsored plan” (emphasis in original).

24                  UBH contends that “corporate-wide policies that implicate multiple plans” may not  
25 implicate fiduciary duties. Joint Submission at 7 (quoting *Peters v. Aetna Inc.*, 2018 WL 3616923,  
26 at \*8–10 (W.D.N.C. July 27, 2018) for the proposition that “decisions ‘that benefited a broad  
range of health-care consumers and were not directly associated with the Plaintiff’s Plan or any  
other particular benefit plan’ were not fiduciary in nature.”); *see also Acosta v. Brain*, 910 F.3d

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27                  <sup>5</sup> The first two examples are: “(i) Interpreting a plan document, such as deciding whether a given  
28 type of treatment is covered by a member’s plan; (ii) Making a clinical determination about  
whether a service or treatment is medically necessary and/or clinically appropriate.”

1 502, 518 (9th Cir. 2018) (actions that constitute a corporate “business decision” are “not subject  
 2 to fiduciary duties even if those policies have “an effect on an ERISA plan” (quotation marks  
 3 omitted)). UBH is concerned with the suggestion “that *every* policy that *may have an effect on* the  
 4 administration of employer-sponsored plans necessarily implicates a fiduciary duty.” Joint  
 5 Submission at 7 (first emphasis in original; second emphasis added).

6       The Special Master does not read Plaintiffs’ proposed text to suggest that “*every* policy  
 7 that may have an effect on the administration of employer-sponsored plans necessarily implicates  
 8 a fiduciary duty.” UBH Statement: Joint Submission at 7 (emphasis in original). Instead, the  
 9 Special Master accepts Plaintiffs’ observation that the example is limited to developing guidelines  
 10 or other policies “to administer or interpret employer-sponsored plans.” *Id.* Therefore, consistent  
 11 with the Court’s finding that UBH acts as a fiduciary “when it adopts and applies its Guidelines to  
 12 coverage determinations” (FFCL, ¶ 197), the Special Master adopts Plaintiffs’ proposed text.<sup>6</sup>

13           **2. Dispute No. 5 (Pages 10-12)**

14       Following the lesson on “What is an ERISA fiduciary?”, trainees will be required to  
 15 answer a series of questions to test their learning. Dispute No. 5 arises in connection with the  
 16 fourth question. *See* Joint Submission at 10. The fourth question, which is multiple choice, asks:  
 17 “Which of the following are examples of fiduciary acts, such that UBH owes fiduciary duties to  
 18 plan members when engaged in these acts?”, and provides four answers:

- 19           A. Deciding whether continued service for partial hospitalization is medically necessary  
 20           for a given member.
- 21           B. Deciding whether residential treatment should be considered custodial.
- 22           C. [The disputed answer].
- 23           D. All of the above.

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25       <sup>6</sup> For Dispute No. 2 (page 6), UBH states that it “agrees that the word ‘potential’ can be deleted  
 26 from UBH’s proposed language in this item” “if the Special Master adopts UBH’s proposed  
 27 language relating to example (iii) below.” Joint Submission at 6. Because the Special Master does  
 28 not adopt UBH’s proposed language for example (iii), resolution of that dispute does not resolve  
 Dispute No. 2. The Special Master adopts Plaintiffs’ proposed text for Dispute No. 2 (“Examples  
 of ‘fiduciary acts’ regularly performed by UBH employees include...”).

1       Upon selecting “all of the above,” the trainee will receive the following message: “Correct.  
 2 Each of the acts above involves interpretation of plan terms and discretion in plan administration.  
 3 Any UBH personnel conducting any of these activities must comply with the fiduciary duties set  
 4 forth in ERISA and described in this training.” Joint Submission at 11–12.

5       For the third answer,

- 6       • Plaintiffs propose: “**Developing a clinical policy regarding whether a category of**  
          **treatment** is covered or not covered under United’s employer-sponsored plans.”
- 7       • UBH proposes: “**Interpreting plan exclusions to make a determination about**  
          **whether a specific treatment** is covered or not covered by an employer-sponsored  
          plan.”

10      Plaintiffs contend that “[t]he point of this question is to test UBH personnel’s  
 11 understanding that across-the-board interpretations (i.e., applicable to multiple plans) are still  
 12 subject to fiduciary duties.” Joint Submission at 10. According to Plaintiffs, “UBH’s wording . . .  
 13 removes this important lesson, and would test only whether employees understand that making  
 14 coverage determinations is a fiduciary act, but not the across-the-board point.” *Id.*

15      Care Advocates, however, will not be called on to “develop[ ] a clinical policy regarding  
 16 whether a category of treatment is covered or not covered under United’s employer-sponsored  
 17 plans.” Joint Submission at 10 (Plaintiffs’ proposed example). Instead, Care Advocates are  
 18 responsible for “[i]nterpreting plan exclusions to make a determination about whether a specific  
 19 treatment is covered or not covered by an employer-sponsored plan.”<sup>7</sup> *Id.* (UBH’s proposed  
 20 example). UBH’s example is, therefore, more relevant, and thus of greater practical value, to the  
 21 Care Advocates. Accordingly, the Special Master adopts UBH’s version.

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25      <sup>7</sup> “When a member or provider submits a request for coverage to UBH, a Care Advocate is  
 26 assigned to (1) determine whether there is an administrative (i.e., non-clinical) basis to deny the  
 27 request, such as a contractual exclusion for a particular form of treatment or a certain condition,  
 28 and (2) make an initial determination whether the prescribed treatment, at the proposed level of  
      care, meets criteria in the applicable Guideline.” FFCL (ECF 329) at 23 (citations omitted).

### III. CONCLUSION AND ORDER

The parties are directed to review and incorporate the Special Master's determinations as set forth above in a final revised joint version of the asynchronous training script.

Dated: June 30, 2021

FARELLA BRAUN + MARTEL LLP

By: /s/ *Douglas R. Young*

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Douglas R. Young

## SPECIAL MASTER

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